

MESRA ASSOCIATES SDN BHD*a***v.****GOH CHOON AUN & ORS**

HIGH COURT MALAYA, PENANG

b

RK NATHAN J

[CIVIL SUIT NO: 22-611-99]

5 MAY 2003

CIVIL PROCEDURE: *Costs - Security for costs - Whether defendant provided credible testimony that plaintiff would be unable to pay costs - Statement of accounts showing plaintiff's losses - Whether plaintiff has bona fide claim with reasonable prospect of success - Whether defendant's application an attempt to stifle plaintiff's genuine claim - Plaintiff's impecuniosity caused by conduct of defendant, effect of - Probability of plaintiff being unable to pursue claim against defendant if security for costs ordered, effect of - Companies Act 1965, s. 351(1)*

*c**d*

This was the defendants' appeal against the decision of the senior assistant registrar dismissing their application under s. 351(1) of the Companies Act 1965 for security for costs amounting to RM604,989.03 against the plaintiff company. In seeking to provide 'credible testimony' that there was reason to believe that the plaintiff would be unable to pay their costs if they were to be successful in their defence, the defendants tendered the plaintiff's statement of accounts for the years 1997, 1998 and 1999 which showed that the plaintiff had been sustaining losses for three consecutive years. Conversely, the plaintiff attributed its financial difficulties to the defendants' failure to pay the contractual sums due to it from the defendants. At all material times, the plaintiff was the m&e engineering consultant engaged by the defendants for their various development projects.

*e**f***Held:***g*

[1] The plaintiff had been filing its statement of accounts all through the years, and was still carrying on with its business. In the instant case, it had an elaborate and substantial claim against the defendants which the latter had not attempted to strike out. The plaintiff had also filed a reply to the defendants' defence, as well as a defence to the 2nd defendant's counterclaim. It would thus appear that the plaintiff had a legitimate cause of action, and that the defendants' application for security for costs was an abuse of the process of the court and a clear

*h**i*

- a* attempt to stifle the prosecution of the plaintiff's claim. In contrast, the plaintiff had shown that it had a *bona fide* claim against the defendants with a reasonable prospect of success. (p 108 e-g)
- b* [2] The defendants did not deny or reply to the plaintiff's averment that the 1st defendant had offered to transfer one unit of a condominium worth RM270,000 to the plaintiff to set-off the plaintiff's claims. Furthermore, it was also possible that the plaintiff's financial difficulties were brought about by the conduct of the defendants in delaying the payments that were due to the plaintiff. (pp 109 a-h & 110 a-i)
- c* [3] An application for security for costs may be disallowed if a plaintiff, not unlike the plaintiff herein, has shown that there is a probability that it will be unable to pursue its genuine claim against a defendant if an order for security for costs is made against it. It is a just principle of law worthy of special consideration that an impecunious party should not be driven from the judgment seat unless the justice of the case so demands. (p 111 a-c)
- d*

[Defendants' appeal dismissed with costs.]

Case(s) referred to:

- e* MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 11) [1999] 5 CLJ 131 (foll)
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 1 QB 609 (foll)
Skrine & Co v. MBf Capital Bhd & Anor [1998] 3 CLJ 432 CA
Southern Cross Exploration NL v. Fire and All Risks Insurance Co Ltd [1985] 1 NSWLR 114 (foll)
- f* Strukturmas (Selangor) Sdn Bhd v. Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344 HC (dist)
Trident International Freight Services Ltd v. Manchester Ship Canal Co & Anor [1990] BCLG 263 (foll)
Warren Mitchell Pty Ltd v. Australian Maritime Officers' Union and Ors [1993-94] 12 ACSR 1 (foll)

g **Legislation referred to:**

Companies Act 1965, s. 351(1)

For the appellants/defendants - Rusmin Alwani Shukery; M/s Shahrizat & Tan

For the respondent/plaintiff - Devano Hasbi; M/s Tan Kim Soon & Co

- h* Reported by Gan Peng Chiang

i

JUDGMENT**RK Nathan J:****Facts**

This is an application (encl. 34) by all the defendants for an order that the plaintiff do provide security for costs amounting to RM302,495.01 for the 1st defendant, RM169,247.51 for the 2nd defendant, RM10,767.86 for the 3rd defendant, RM21,000 for the 4th defendant, RM47,886.50 for the 5th defendant and RM53,592.15 for the 6th defendant or such sums as the court deems just and fair, and that all proceedings be suspended until such time as such security for costs as is ordered to be paid is paid, and if not paid within three months from the date of the order, then for an order that the said suit be deemed dismissed with costs. The defendants also prayed for the costs of this application.

Enclosure 34 was heard and dismissed by the learned senior assistant registrar. This is the defendants' appeal against the said dismissal.

Findings Of The Court

This application by the defendants is made pursuant to s. 351(1) of the Companies Act 1965 which reads as follows:

Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The defendants filed three affidavits amongst them, to show by 'credible testimony' that there is reason to believe that the plaintiff will be unable to pay the costs of the defendants if they are successful. The defendants exhibited the accounts of the plaintiff for the years 1997, 1998 and 1999 and this showed that the plaintiff had been sustaining losses for the three years consecutively. However the accounts for the year ending 2000 showed a net profit after taxation, although a small sum. Whilst the plaintiff admits in its affidavit (encl. 40) that it has a financial problem, it attributes this to the non-payment of its contracted sums by the defendants. The plaintiff was at all material times the consulting Mechanical & Electrical Engineers employed by the defendants. The 1st defendant was at all material times a director common to the 2nd to the 6th defendants who were the owners and

a developers of the building projects in respect of which the plaintiff was engaged. The plaintiff has pleaded an elaborate statement of claim against all the defendants and has averred that its financial problem has been occasioned by the non-receipt of payments due from the defendants.

b The defendants relied on *Strukturmas (Selangor) Sdn Bhd v. Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344, a case decided by me in which I had held that it was not proper for a plaintiff to contend that its losses were occasioned as a result of the defendant's action. The facts in *Strukturmas* were different. In that case the action was filed by the plaintiff and left for almost ten years. The defendant's solicitor made a search at the registry of companies eight years after the suit was filed and discovered that the plaintiff's current liabilities far exceeded its current assets. The most significant revelation was that since 1992, the plaintiff had yet to file its annual audited accounts for the subsequent years. The defendant then applied for certain orders pertaining to security for costs against the plaintiff.

c The defendant's application was heard by the senior assistant registrar and was dismissed with costs. The defendant appealed. I allowed the appeal because I held that since 1992 and for the subsequent eight years the plaintiff had not filed the returns and this fact had not been denied by the plaintiff in its affidavit. If there was any trading there must be returns. It called for the presumption that the plaintiff was a dormant company waiting to inject itself with funds from this case.

d

e

The facts of the present case before me are different. The plaintiff has filed its statement of accounts for all the years and is carrying on its business. It has a very substantial claim against the defendants. The defendants had made no attempt to strike out the plaintiff's claim which *prima facie* gives the impression that the plaintiff has a legitimate cause of action. Indeed the 2nd defendant has even made a counter-claim and the plaintiff has filed a reply to the defence of all the defendants and a defence to the counter-claim of the 2nd defendant. The 2nd defendant had also filed a request for further and better particulars.

f

g

It is my judgment that this application for security for costs is an abuse of the process of the court and is a clear attempt to stifle prosecution of the plaintiff's claim.

h

i

In *Skrine & Co v. MBf Capital Bhd & Anor* [1998] 3 MLJ 649 in addressing its mind to s. 351(1) of the Companies Act the Court of Appeal held at pp. 657/658 as follows:

The section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the Plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

This principle was distilled by the Court of Appeal from *Southern Cross Exploration NL v. Fire and All Risks Insurance Co Ltd* [1985] 1 NSWLR 114 where at p. 134 Waddell J said:

The first may be described as a threshold question. It is, whether, having regard to the whole of the evidence before the court, there is credible testimony by which it appears that there is reason to believe that the Plaintiffs will be unable to pay the costs of the Defendants if successful in their defence. If this question is answered, yes, the second question arises which is whether, in the exercise of the discretion given to the court by the subsection, the relief sought should be granted wholly or in part or should be refused.

Applying the first test I must now see if from the whole of the evidence there is credible evidence tendered by the defendants as to the plaintiff's impecuniosity. The defendants have merely tendered the plaintiff's statement of accounts for the years 1977 to 1999. However for the year 2000 the plaintiff has made a slight profit. The plaintiff is trading and is carrying on business. But what is of paramount consideration is the plaintiff's averment that the 1st defendant had offered to transfer one unit of a condominium worth RM270,000 to the plaintiff. The fact that there was the condominium to contra as contained in the plaintiff's letter, exh. LBK 12 to encl. 38, has not been replied to nor denied by the defendants. It is also pertinent to consider the words of Lee J in *Warren Mitchell Pty Ltd v. Australian Maritime Officers' Union and Others* [1993-94] 12 ACSR 1 at p. 5:

The use of the word 'credible' suggests a requirement that evidence to be relied upon has some characteristics of cogency. Qualification of the word 'testimony' by the word 'credible' suggests that an evidentiary burden is undertaken by the party seeking the order. It amounts to an obligation on an applicant for an order to show that the material before the court is

- a* sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the corporation would be unable to pay the costs of that party upon disposal of the proceedings. To what extent the satisfaction of that standard may fall short of the demonstration of a likelihood that the corporation will be insolvent at the relevant time is unnecessary to decide. It is enough to say that speculation as to insolvency or financial difficulties likely to confront the corporation will be insufficient to ground the exercise of the discretion.
- b*

In the circumstances I am not at all convinced that the defendants have satisfied the court in respect of the first test set out by the Court of Appeal in *Skrine & Co. (supra)*.

- c*
- In *MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 11)* [1999] 5 CLJ 131 this is what I said at p. 137/138 after considering s. 351(1) of the Companies Act.

- d* The word credible evidence does not mean evidence tested at the forge of a trial by the fire of cross-examination. It suggests that it is reasonably possible, based on the evidential burden of proof resting with the Defendants, that the 1st Plaintiff would be unable to pay the costs.

The Court of Appeal in *Skrine & Co (supra)* had upheld this, judgment.

- e* In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 1 QB 609 the Court of Appeal held that even where there was credible evidence that a limited company would be unable to pay the costs of a successful debt, their s. 447, almost similar in context to our s. 351(1), is not mandatory but gave the court a discretion whether or not to order security for costs against the company where there were special circumstances. In what could be considered special circumstances Lord Denning MR said at p. 626 as follows:
- f*

- g* The Court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.

- h* I too have considered these issues, and accepting the judgment in *Sir Lindsay Parkinson & Co Ltd* as authority, I hold that since there is substance in the plaintiff's claim by the very fact that the 1st defendant had offered a condominium as a set off, this application for security for costs is an attempt to stifle a genuine claim and that as pleaded by the plaintiff, it is possible that the plaintiff's position has been brought about by the conduct of the defendant in causing such delay in payment.
- i*

In *Trident International Freight Services Ltd v. Manchester Ship Canal Co and Another* [1990] BCLG 263 the Court of Appeal held that an application for security may be dismissed if the plaintiff company shows, whether expressly or impliedly, that there is a probability that it will be unable to pursue the action if the order is granted. I have long considered this view as being a just one and having read the plaintiff's copious affidavits and the numerous letters exhibited pleading for payments, I am moved to state that it must be a matter for special consideration, that an impecunious party should not be driven from the judgment seat, unless the justice of the case makes it so. Having read all the affidavits and the statement of claim and the defences, I am satisfied that the plaintiff has shown that it has a *bona fide* claim against the defendants with a reasonable prospect of success. I therefore dismissed the appeal with costs.

a

b

c

d

e

f

g

h

i